NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-5636

ROGER DALE STAFFORD,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

I.
QUESTIONS PRESENTED

1. Can a state appellate court consistent with the Sixth and Fourteenth Amendments to the United States Constitution determine effectiveness of counsel without an evidentiary hearing where sufficient allegations clearly demonstrate ineffectiveness of counsel on the part of Petitioner's trial counsel?

2. What standard of competency under the Sixth and Fourteenth Amendments is to be followed by a trial counsel representing Petitioner in a capital case?

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on the 20th day of June, 1983.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and appears at 665 P.2d 1205. It is annexed as Appendix A to this petition. The order denying rehearing is unreported. It is annexed as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on June 20, 1983. A timely petition for rehearing was denied on July 26, 1983. The Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, extended time to file this Petition for Writ of Certiorari until October 23, 1983 by order dated September 23, 1983 A-209. Appendix C Jurisdiction of this Court is invoked under 28 U.S.C. §1257[3].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, in relevant part:

> "...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to have a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed...; and to have the assistance of counsel for his defence."

The Eighth Amendment to the Constitution of the United States which provides, in relevant part:

> "Excessive bail shall not be required,... nor cruel and unusual punishments inflicted."

This case also involves provisions of the Oklahoma Statutes.

1. O.S. 21 §701.7 Murder in the first degree.

> A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

> A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

STATEMENT OF THE CASE

The petitioner, ROGER DALE STAFFORD, was convicted of six counts of murder in the first degree. 21 O.S. 701.7. He was sentenced to death for each murder.

THE EVIDENCE AT TRIAL

According to the testimony of Verna Stafford, wife of Petitioner, she, the Petitioner and his brother, Harold Stafford, drove from Tulsa to Oklahoma City to rob a Sirloin Stockade Restaurant. R.1* They waited outside in the restaurant parking lot until all the customers had left. (Tr. 535) They exited their automobile and Roger Stafford knocked on the side door of the restaurant. The manager was forced to take them inside to the cash register and open the office safe. (Tr. 537-541) According to Verna Stafford, she and Harold held the employees at gunpoint while the petitioner and the manager emptied the office safe which contained about $1,290.00. (Tr. 543-544) Thereafter, the employees were ordered inside the restaurant's walk-in freezer, (Tr. 544) whereupon according to her testimony, she thereafter heard gunfire. (Tr. 549) All six Sirloin Stockade employees died as a result of the shootings.

*The record in the Oklahoma Court of Criminal Appeals consists of a bound record consisting of instruments filed in the trial court (hereinafter referred to as R.) and a trial transcript (hereinafter referred to as Tr.)

Pamela Ann Lynch identified the petitioner as being the driver of a green station wagon that almost colided with her car that night by the Sirloin Stockade. The identification of petitioner by this witness at trial was made over a year after the shootings at the Sirloin Stockade. No request for an in-camera hearing on identification despite massive pictorial displays in newspapers and televisions of petitioner was requested. (Tr. 524)

Linda McFarland Lewis, working as a maid at the Holiday Motel in Tulsa, testified she recalled petitioner slapping Verna Stafford and hearing Verna Stafford say she was calling the police and Roger Stafford saying you would be in as much trouble as I would and she saying "I didn't kill them Roger, you did." And Roger saying "You were there and you were with us." (Tr. 751)

On cross-examination, counsel never pinpointed the time on the 17th day of July when petitioner supposedly made this statement, counsel knew petitioner was at work and counsel further never informed the jury at what point in time in the investigation of the Sirloin Stockades did Mrs. Lewis first come forward with this evidence.

Terecia Darlene Bennett testified that she too was working in the Holiday Motel in Tulsa, Oklahoma as a maid. That on the afternoon of July 16, 1978, she barged into Room 119 of the Holiday Motel (Tr. 761) She further testified that she thereafter went to the laundry room and she saw her sister, Rose, and in the laundry room there were some boxes that Roger Stafford had asked her sister, Rose, to burn and inside the dumpster when they went to the dumpster was a pair of bluejeans that appeared to have blood on them. (Tr. 763). She identified the boxes that Roger Stafford asked her sister to burn as boxes similar to these at a Sirloin Stockade. (Tr. 765)

The witness further testified that as she was walking by petitioner, she asked him if he had heard about the Sirloin

Stockade killings and he stated "yes" and jokingly she said "you're probably the one who killed them" and he said "yes I did." (Tr. 772-773)

Roseanna Marie Collins testified that she too worked in the Holiday Motel in Tulsa and that she saw Roger Stafford and Verna Stafford on July 16, 1978. (Tr. 786) She stated she entered the Holiday Motel room that Verna and Roger Stafford had walked into and she saw a large amount of money on the bed. (Tr. 790) She also stated she noticed that Verna had some boxes. (Tr. 790) She identified boxes coming from the Sirloin Stockade as similar to the boxes she saw in the motel room that morning. (Tr. 791) She further testified to a conversation she had with Roger Stafford wherein she said "You didn't really kill them did you Roger?" to which he answered "Yes I did." (Tr. 797)

Witnesses from the Oklahoma State Bureau of Investigation and the petitioner himself testified that while Roger Stafford was in Oklahoma City in approximately January, 1979, six months after the killing, he responded to a composite drawing flashed on the television and called the Oklahoma State Bureau of Investigation and stated that two of the three people in the composite drawings were Harold Stafford and Verna Stafford.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner requested through his appellate counsel, an evidentiary hearing to determine the effectiveness of his trial counsel for purposes of appellate review. The Oklahoma Court of Criminal Appeals denied this request and stated in its opinion affirming petitioner's conviction and sentence that they did not need an evidentiary hearing to determine effectiveness of counsel's representation.

2. The Oklahoma Court of Criminal Appeals in its Opinion, assessed the effectiveness of counsel under the mockery of justice standard stating the reasonably competent standard was to be applied prospectively only. Petitioner had contended on appeal that he was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER AN EVIDENTIARY HEARING IS REQUIRED AS A MATTER OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO MAKE A DETERMINATION ON EFFECTIVENESS OF COUNSEL WHERE SUFFICIENT ALLEGATIONS DEMONSTRATE INEFFECTIVENESS.

A major issue involved in petitioner's direct appeal to the Oklahoma Court of Criminal Appeals was the issue of effectiveness of his legal representation under the Sixth and Fourteenth Amendments to the United States Constitution. The Oklahoma Court of Criminal Appeals in determining that petitioner was given effective assistance of counsel determined that counsel's performance was not so ineffective that the trial was reduced to a farce or mockery or was shocking to the conscience of this court. The court found counsel's representation was not perfunctory or bad faith or a sham./2

In the instant case, petitioner by his appellate counsel, requested a remand for an evidentiary hearing on allegations dealing with the effectiveness of counsel. Stafford v. State, F 79-722 and F 80-256, November 4, 1981. This motion was denied. The court thereafter addresses the claim of effectiveness of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and determines

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2/ Oklahoma has adopted the reasonably competent assistance of counsel test but has treated that test as prospective only. See Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980).

that petitioner was effectively represented. The court specifically notes that unverified affidavit of present counsel relating hearsay statements shall not be used in considering appellant's counsel's contention of effectiveness of counsel./3

As can readily be seen from a glancing of the opinion of the Oklahoma Court of Criminal Appeals, there are numerous factual issues which must be litigated to demonstrate ineffectiveness of counsel. In addition, an evidentiary hearing is necessary to demonstrate the critical area of lack of investigation and preparation on the part of defense counsel which is a critical means of determining effectiveness of counsel. See United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980). Similarly, to determine effectiveness of counsel in the second stage of the trial proceedings and determine why counsel put on no evidence in mitigation, an evidentiary hearing would develop what witnesses were available to the defendant had counsel properly prepared an effective second stage.

The necessity of determining counsel's reasons for not putting on this evidence and his overall trial strategy can only be developed through an evidentiary hearing. See Goodpaster (The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases) 58 N.Y.U. Law Review 274 (1983).

3/ The Oklahoma Court of Criminal Appeals has never addressed the issue whether a defendant who alleges effectiveness of counsel is entitled to an evidentiary hearing on post-conviction relief. This issue is currently pending before the Oklahoma Court of Criminal Appeals. Parks v. State, PC -83-461 (August 5, 1983).

Similarly, due process is violated when the defendant is precluded from obtaining a complete and effective review of his conviction because his counsel has chosen not to file a complete record. Entsminger v. Iowa, 386 U.S. 746, 752, 87 S.Ct. 1402, 1404 (1967). In the instant case, counsel had voir dire examination recorded but then in his original designation, failed to include voir dire and supplementally asked for the voir dire proceedings. The supplemental portions of these proceedings were never served on the court reporter and therefore not available for appellate consideration. See Stafford v. State, supra at 655 P.2d 1213. The reasons for counsel's failure to serve the court reporter should be determined by an evidentiary hearing. Also, an evidentiary hearing would determine the reason for the ommission of specific errors in petitioner's motion for new trial by his trial counsel which are necessary in order to preserve error for appellate review in the State of Oklahoma. McDuffie v. State, 651 P.2d 1055 (Okl.Cr. 1982). Further, a review of the original record in the instant case demonstrates petitioner's trial counsel was initially his appellate counsel and continued to be as appellant counsel until he failed to file a brief at the Court of Criminal Appeals whereupon the Court of Criminal Appeals Ordered the District Court to appoint outside counsel or find new counsel for petitioner and the reasons why trial counsel failed to properly file an appeal could have also been explored in said evidentiary hearing.

From just a review of a cold trial record, it is impossible to tell what procedures trial counsel followed in determining that television cameras should be allowed to televise the proceeding and under what basis the representation of petitioner had been secured by trial counsel and whether these factors violated the petitioner's right to effective assistance of counsel and what prejudice may have resulted.

Failure to grant Petitioner an evidentiary hearing rendered any discussion of effectiveness of counsel incomplete. The finding of the Oklahoma Court of Criminal Appeals that counsel was competent absent an evidentiary hearing, is inconsistent with the Sixth and Fourteenth Amendments to the United States Constitution to effective assistance of counsel. This Court should grant certiorari and hold under the Sixth and Fourteenth Amendments that where sufficient allegations demonstrate a claim of effectiveness of counsel, a hearing must be held on these allegations to determine their validity.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE APPROPRIATE STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Oklahoma Court of Criminal Appeals in the instant case judged the effectiveness of counsel's representation under the mockery of justice standard. This was so despite the fact that approximately three years prior to the decision of the Court of Criminal Appeals in Stafford, the Oklahoma Court of Criminal Appeals adopted the reasonably competent assistance of counsel test. The Oklahoma Court of Criminal Appeals applied this test prospectively only and finding that Stafford was tried prior to the ennunciation of this standard addressed his representation under the farce or mockery of justice standard./4

This Court is currently faced with determining the correct standard for review of claims of ineffective assistance of counsel. See Strickland v. Washington, 82-1554. 693 F.2d 1243 (5th Cir. en banc). Counsel requests that this Court grant certiorari and reverse the Oklahoma Court of Criminal Appeals for following the sham, mockery of justice standard in determining effective assistance of counsel under the Sixth and Fourteenth Amendments.

4/ This interpretation appears to be inconsistent with the Tenth Circuit Court of Appeals' interpretation of effectiveness of counsel and the prospective application of said standard. See Runnels v. Hess, 653 F.2d 1364 (10th Cir. 1981) and Gaines v. Hess, 662 F.2d 1371 (1981) requiring the following of the reasonably competent assistance of counsel test to cases tried prior to its ennunciation of that standard in Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Robert A. Ravitz, certify that I mailed a copy of this Petition for Certorari and all accompanying documents to Michael C. Turpen, Attorney General, State of Oklahoma, Suite 112, State Capitol, Oklahoma City, Oklahoma 73105 this 13th day of October, 1983.

Robert A Ravitz

ROBERT A. RAVITZ

APPENDIX A

Opinion of the Oklahoma
Court of Criminal Appeals

then asked if that meant she could possibly impose the death penalty in a particular case, and she said, "Yes. That is right." Finally, the court asked her his standard, "Could you agree to a verdict imposing the death penalty without doing violence to your conscience?" question, and she answered, "No." [2] As I have already said, whether it would do violence to her conscience is not the issue. This voir dire is replete with confusion, and the only two things that are clear are as follows: It would affect her conscience. And this would not prevent her from considering the death penalty under the appropriate circumstances.

The exclusion of Juror Musgrave was error.

For these reasons, I believe that the sentence should be modified to imprisonment for life.

Roger Dale STAFFORD, Sr., Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-79-722.

Court of Criminal Appeals of Oklahoma.

June 20, 1983.

Rehearing Denied July 26, 1983.

Defendant was convicted in the District Court, Oklahoma County, Charles L. Owens, J., of six counts of murder in the first degree. The jury imposed the death penalty on all counts, and defendant appealed. The Court of Criminal Appeals, Cornish, J., held that: (1) defendant was not denied effective assistance of counsel; (2) testimony of defendant's wife did not violate husband and wife privilege, since trial judge limited wife's testimony to her personal observations and conversations with her husband which were made in presence of third persons; (3) testimony of witness as to conversation she overheard between defendant and his wife was admissible, even if conversation was intended to be confidential; (4) evidence was sufficient to support finding that murders were especially heinous, atrocious, or cruel; (5) evidence was sufficient to support finding that murders were committed for purpose of avoiding or preventing lawful arrest or prosecution; and (6) evidence was sufficient to support finding that there existed probability that defendant would commit criminal acts of violence that would constitute continuing threat to society.

Affirmed.

1. Constitutional Law ⇐266(7)
Homicide ⇐351

Statute which provides that in order to impose sentence of death jury must unanimously find at least one aggravating circumstance beyond a reasonable doubt, and if jury does find aggravating circumstance exists it must determine whether aggravating circumstance is outweighed by finding of one or more mitigating circumstances, does not offend Eighth or Fourteenth Amendments by unconstitutionally shifting burden of proof to defendant by requiring him to present evidence in mitigation of death penalty, since statute clearly places burden of proof on State to prove beyond reasonable doubt existence of any aggravating circumstances, and defendant is merely required to come forward with evidence of any mitigating circumstances, if he wishes to do so because mitigating circumstances are peculiarly within knowledge of defendant. 21 O.S.1981, § 701.11; U.S.C.A. Const.Amends. 8, 14.

2. Homicide ⇐354

Defendant in first-degree murder prosecution was not entitled to preliminary

2. The crucial determination is whether the juror would conscientiously consider the death penalty as one of the punishment alternatives, not whether it would affect her conscience.

hearing on aggravating circumstances State intended to prove.

3. Criminal Law ⇐641.13(1)

To support defendant's contention that he was denied effective assistance of counsel, defendant must show that counsel's performance was so ineffective that trial was reduced to farce or mockery of justice, or was shocking to conscience of Court of Criminal Appeals, or that counsel's services were only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation; burden is a heavy one, and is not satisfied by simply pointing out possible errors in counsel's judgment, or lack of success in defense. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐905, 954(1)

Office of motion for new trial is to put trial judge on notice of alleged errors so that he or she can take curative action, and specific statement of allegations of error in motion for new trial is necessary in order to preserve such error for appellate review.

5. Criminal Law ⇐641.13(7)

Omission of nonmeritorious arguments from motion for new trial does not evidence attorney incompetence.

6. Criminal Law ⇐641.13(2)

Defendant was not denied effective representation on ground that trial counsel permitted television cameras in courtroom to defendant's detriment, where defendant personally approved presence of cameras after being fully advised of his rights in open court by trial judge, there was no indication that ethical canon which limits number and kind of cameras and microphones and enjoins disruptive use of such equipment was violated, jury was sequestered, and there was no showing that they were exposed to resulting news coverage. U.S.C.A. Const.Amend. 6; Code of Jud.Conduct, Canon 3, subd. A(7), 5 O.S.A. Ch. 1, App. 4.

7. Criminal Law ⇐1128(2)

Where defendant contended that trial counsel unethically solicited representation, improperly contracted for publication rights, and breached promise to provide all funds necessary for defense, but contentions rested on facts outside record, and defendant submitted, on appeal, unverified affidavit, and a purported but unauthenticated page from defense trial notes, Court of Criminal Appeals would not consider such contentions; it was improper to permit litigation of factual issues by such ex parte affidavits and attachments on appeal.

8. Criminal Law ⇐641.13(1)

An ethical violation, standing alone, does not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(6)

Defendant was not denied effective representation on ground that counsel failed to investigate his psychiatric background in order to offer such evidence in mitigation during sentencing hearing, where allegations supposed existence of favorable psychiatric testimony, and record did not support supposition. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(2)

Defendant was not denied effective counsel on ground that trial counsel failed to interview him for trial, where allegation was based on isolated portion of testimony of defendant, which when viewed with other relevant testimony made it clear that counsel did in fact confer with defendant and that defendant, in isolated portion, merely meant to convey that counsel had not coached his testimony or told him what to say. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(7)

Where, in sentencing hearing, both State and defense opted to rely on evidence submitted in first stage guilt proceeding, neither side offered additional evidence in second stage, jury was instructed that it could consider in sentencing stage any evidence admitted throughout trial by either side, and defendant did not indicate what additional evidence could or should have been offered in sentencing hearing, failure of defense counsel to offer any evidence during sentencing proceeding did not con-

stitute ineffective representation. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(1)

Hindsight is not proper measure of adequacy of legal representation. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(6)

Calling a former cellmate to witness stand without first obtaining sworn statement from witness, who gave testimony damaging to defendant, did not constitute ineffective representation on part of defense counsel, where counsel judged it urgent to call witness to rebut prosecution's witness, and witness had represented that he would testify favorably to defense, counsel's action was, at most an error of judgment. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)

Whether or not voir dire and similar proceedings should be recorded is a matter of trial tactics, and decision not to have such proceedings recorded is not ineffective assistance of counsel, absent supplementation of record by affidavit or pleading, showing alleged prejudicial occurrences; same rule governs counsel's decision whether to designate voir dire and other proceedings for inclusion in record on appeal. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐641.13(7)

There was no basis for finding that defense counsel's failure to designate voir dire proceedings for inclusion in record on appeal constituted ineffective assistance, where defendant's suggestion that jurors might have been excluded for cause at voir dire in violation of *Witherspoon* rule was refuted by defense argument at trial that judge improperly applied majority opinion in *Witherspoon* at voir dire, rather than the specially concurring opinion in that case, it was alleged at trial that eight jurors were excused for cause under majority opinion in *Witherspoon*, and trial judge remarked that he was amazed at small number who went off for that reason. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐641.13(2)

Where defense counsel filed numerous pretrial motions on defendant's behalf, interposed frequent objections during prosecution's case, vigorously cross-examined State's witnesses, placed defendant on stand in an effort to establish an alibi defense, and, though not offering evidence in sentencing hearing, counsel argued mitigating circumstances to jury and made impassioned plea for defendant's life, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐438(1)

Admissibility of photographs lies within sound discretion of trial judge.

18. Criminal Law ⇐438(6)

Six color photographs depicting five employees shot to death in freezer of restaurant were properly introduced in evidence in murder prosecution, where photographs illustrated medical examiner's testimony, and enabled jury to view manner in which victims were killed, thus corroborating testimony of witness.

19. Witnesses ⇐193

Testimony of wife of defendant did not violate husband-wife privilege, where trial judge specifically limited wife's testimony to her personal observations and conversations with her husband which were made in presence of third persons, since such conversations in presence of third party were not of confidential nature. 12 O.S.1981, § 2504, subds. A, B.

20. Witnesses ⇐193

Irrespective of whether communications between husband and wife are intended to be confidential, third persons may testify as to conversations overheard, whether accidentally or by design. 12 O.S. 1981, § 2504, subds. A, B.

21. Witnesses ⇐193

Testimony of witness who accidentally overheard conversation between defendant and wife was properly admitted, despite fact that conversation was intended to be confidential. 12 O.S.1981, § 2504, subds. A, B.

22. **Criminal Law ⇐126(1)**

Resolution of issue of whether trial court errs in denying application for change of venue depends upon whether defendant establishes that inhabitants of county in which trial is held have such fixed opinions as to his guilt that he could not receive a fair trial by an impartial jury.

23. **Criminal Law ⇐126(2)**

Trial court did not abuse its discretion in denying application for change of venue in murder prosecution, where news persons testified that case had received extensive coverage, but that references to defendant were always prefaced by such qualifying language as "accused," "alleged" and "suspected," and transcript revealed that State offered 50 affidavits of residents of county which stated that media coverage of case had been fair, that an unbiased jury could be selected in county, and they had formed no opinions as to defendant's guilt or innocence.

24. **Criminal Law ⇐1115(2)**

Where defendant claimed that trial court erred in denying motion for an individual voir dire of prospective jurors, but transcript of voir dire was not in record on appeal, Court of Criminal Appeals would assume that trial judge's ruling was correct.

25. **Constitutional Law ⇐268(5)**

Where defendant claimed that State deliberately withheld exculpatory written statement given by defendant's wife, but record was unclear as to whether defense counsel received copy of statement, defendant's due process rights were not violated; even if prosecution did fail to provide defense with statement, it did not affect outcome of trial as prosecution presented evidence of statement to jury for their consideration. U.S.C.A. Const.Amend. 14.

26. **Criminal Law ⇐412.1(3)**

Where, while defendant was in custody prior to his appearance before magistrate, he was informed that he was being held on a murder complaint, he was read his *Miranda* rights, he was questioned in regard to slayings, and he gave statement prior to being taken before magistrate for initial arraignment, defendant did not meet burden of establishing prejudice by reason of two-day delay in taking him before magistrate.

27. **Criminal Law ⇐423(3)**

Testimony of defendant's wife as to statement made by accomplice that he would go ahead and get guns ready was not hearsay, since it was made by a coconspirator of a party during course and in furtherance of conspiracy. 12 O.S.1981, § 2801, subd. 4, par. b(5); U.S.C.A. Const.Amend. 6.

28. **Criminal Law ⇐419(2)**

Statement of victim that he couldn't understand why people had to take other people's money and why they couldn't work for themselves did not constitute hearsay since statement was not offered to prove truth of matter asserted but was relevant solely because it was made, and reliability of statement was not dependent upon veracity of a declarant unavailable for cross-examination. 12 O.S.1981, § 2801, subd. 3.

29. **Homicide ⇐354**

Death sentences were not imposed under influence of passion, prejudice or any other arbitrary factor, where, although victims were employed and presumably resided in county where trial was held and high public feeling could be expected, transcript of murder prosecution did not reflect any bias or prejudice, evidence against defendant was overwhelming, and in itself provided ample support for verdict. 21 O.S.1981, § 701.13, subd. C, par. 1.

30. **Homicide ⇐354**

Evidence in murder prosecution, including evidence that defendant crowded six victims into meat freezer the size of a closet and, with aid of accomplice, opened fire at close range, was sufficient to show aggravating circumstance that defendant knowingly created great risk of death to more than one person. 21 O.S.1981, § 701.12, subd. 2.

31. **Homicide ⇐354**

Evidence in murder prosecution, including evidence that victims anxiously inquired

concerning their safety several times during course of robbery, that they were repeatedly assured they would not be harmed, even as they were forced into meat freezer and ordered to sit on floor, that there was a lot of screaming when defendant and accomplice opened fire, and that several victims were shot from three to five times, was sufficient to support finding of aggravating circumstance that murders were especially heinous, atrocious, or cruel. 21 O.S.1981, § 701.12, subd. 4.

32. Homicide ⇐354

Evidence in murder prosecution, including evidence that as victim entered freezer, he told robbers that he would see to it that they would be caught so as to spare himself any similar ordeal in the future, and that defendant thereafter pressured fellow robber into helping shoot witnesses contrary to plan, was sufficient to support finding of aggravating circumstance that murders were committed for purpose of avoiding or preventing lawful arrest or prosecution. 21 O.S.1981, § 701.12, subd. 5.

33. Homicide ⇐354

Circumstances of offense may furnish extremely probative evidence of probability of future acts of violence. 21 O.S.1981, § 701.12, subd. 7.

34. Homicide ⇐354

Evidence in murder prosecution, including evidence of style in which murders were carried out, coupled with defendant's shockingly calloused attitude, and later threat against witness, was sufficient to sustain finding of aggravating circumstance that there existed probability that defendant would commit criminal acts of violence that would constitute continuing threat to society. 21 O.S.1981, § 701.12, subd. 7.

35. Homicide ⇐354

Death sentences imposed in murder prosecution were not excessive or disproportionate compared with penalty imposed in similar cases, considering both crime and defendant. 21 O.S.1981, § 701.13, subd. C, par. 3.

An appeal from the District Court of Oklahoma County; Charles L. Owens, District Judge.

Roger Dale Stafford, appellant, was convicted on six counts of Murder in the First Degree in Oklahoma County Case No. CRF–79–926. The jury imposed the death penalty on all counts. The appellant perfected an appeal to this Court. The judgments and sentences are AFFIRMED.

Garvin A. Isaacs, Isaacs & Angel, Oklahoma City, for appellant.

Jan Eric Cartwright, Atty. Gen., Susan Talbot, Asst. Atty. Gen., Chief, Appellate Crim. Div., Oklahoma City, for appellee.

OPINION

CORNISH, Judge:

Roger Dale Stafford was convicted on six counts of Murder in the First Degree and sentenced to death.

On July 16, 1978, Roger Stafford, his wife, Verna Stafford, and his brother, Harold Stafford, drove from Tulsa to Oklahoma City to rob the Sirloin Stockade Restaurant. The trio waited in the restaurant parking lot until all the customers had left. At around 10:00 p.m. they exited their automobile and Roger Stafford knocked on the side door of the restaurant. The manager answered the door and was greeted by Roger and Harold Stafford pointing guns at him. They forced him to take them to the cash register and the office safe.

Inside the restaurant, the manager began taunting them, saying that he could not understand why people rob others instead of working for themselves. Roger Stafford hit the manager and demanded that he call his employees to the cash register. The manager complied with the demand.

Harold and Verna Stafford held the employees at gunpoint while the appellant and the manager emptied the office safe which contained about $1290.00. After they obtained the money, the employees were ordered inside the restaurant's walk-in freezer. The appellant then asked Harold Stafford to help him in the freezer. Harold

reminded the appellant that no one was to be hurt. The appellant retorted that "they are going to get what they deserve." He then shot the only black employee, and both men opened fire on the remaining employees. Verna Stafford testified that she heard a lot of gunfire and screaming.

Roger Stafford then told Verna that it was time for her to take part. He placed his gun in Verna's hand and helped her pull the trigger. All six Sirloin Stockade employees died as a result of the shootings.

I

[1] The appellant argues that 21 O.S. 1981, § 701.11 unconstitutionally shifts the burden of proof to the defendant by requiring him to present evidence in mitigation of the death penalty. Section 701.11 mandates that in order to impose a sentence of death the jury must unanimously find at least one aggravating circumstance beyond a reasonable doubt. Additionally, if the jury does find that an aggravating circumstance exists, it must determine whether the aggravating circumstance(s) is outweighed by the finding of one or more mitigating circumstances.

Section 701.11 clearly places the burden of proof on the State to prove beyond a reasonable doubt the existence of any aggravating circumstances. The defendant is merely required to come forward with evidence of any mitigating circumstances, if he wishes to do so. The mitigating circumstances which exist in any given case are peculiarly within the knowledge of the defendant. We hold that this statutory scheme does not offend the Eighth or the Fourteenth Amendments of the United States Constitution. *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982). We further find that this procedure was implicitly upheld by the U.S. Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

II

[2] Stafford also contends that he should have been granted a preliminary hearing on the aggravating circumstances the State intended to prove. We addressed this issue in *Johnson v. State*, 665 P.2d 815 (Okl.Cr.1983), and *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982), where we rejected the argument that a preliminary hearing is required on the bill of particulars in a capital case. We find these cases to be dispositive of the issue at bar.

III

[3] Appellant next contends that he was denied the effective assistance of counsel. This case was tried prior to *Johnson v. State*, 620 P.2d 1311 (Okl.Cr.1980), wherein we prospectively adopted the "reasonably competent assistance of counsel" test. Accordingly, appellant must show that counsel's performance was so ineffective that the trial was reduced to a farce or mockery of justice, or was shocking to the conscience of this Court, or that counsel's services were only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. The burden is a heavy one, and is not satisfied by simply pointing out possible errors in counsel's judgment, or lack of success in the defense. See *Phillips v. State*, 650 P.2d 876 (Okl.Cr.1982).

A number of alleged instances of attorney ineffectiveness are set out in appellant's briefs. He contends that the motion for new trial was "feeble", reflecting incompetence. He appears to complain of the omission from that pleading of many of the allegations of error now urged on appeal.

[4, 5] The office of the motion for new trial is to put the trial judge on notice of alleged errors so that he or she can take curative action, and specific statement of the allegations of error in the motion for new trial is necessary in order to preserve such error for appellate review. See *McDuffie v. State*, 651 P.2d 1055 (Okl.Cr. 1982). We have fully reviewed the errors alleged on appeal, and we find that none are sufficient to warrant reversal or modification. The omission of nonmeritorious arguments from the motion for new trial does not evidence attorney incompetence. See

People v. Tedder, 83 Ill.App.3d 874, 39 Ill.Dec. 53, 404 N.E.2d 437 (1980).

[6] Appellant next contends that trial counsel permitted television cameras in the courtroom to appellant's detriment. However, it is clear that appellant personally approved the presence of such equipment after being fully advised of his rights in open court by the trial judge. [Transcript of Hearing as to Televised Proceedings, 3–6.] This is consistent with his prior action at an earlier stage of the proceedings while represented by other counsel. [Appearance Docket, O.R. 364.]

There is no indication that Canon 3(A)(7), 5 O.S.1981, Ch. 1, App. 4, which limits the number and kind of cameras and microphones and enjoins the disruptive use of such equipment, was not strictly complied with in this matter. Finally, the jury was sequestered, and there is no showing that they were exposed to the resulting news coverage.

[7] Appellant further contends that trial counsel unethically solicited the representation, improperly contracted for publication rights in the case, and breached a promise to provide all the funds necessary for the defense. These contentions rest on alleged facts wholly outside the record. We denied a motion to remand for an evidentiary hearing on similar allegations. *Stafford v. State*, F–79–722 and F–80–256, November 4, 1981.

In order to prove the necessary facts, appellant has submitted with his brief the unverified affidavit of present counsel relating the hearsay statements of named and unnamed third persons, and a purported but unauthenticated page from defense trial notes in the case. We deem it improper to permit the litigation of such factual issues by ex parte affidavits and attachments on appeal. Such procedure has been condemned in other jurisdictions. See *United States v. Thompson*, 475 F.2d 931 (D.C.Cir. 1973); *State v. Gross*, 221 Kan. 98, 558 P.2d 665 (1976); *Pollan v. State*, 612 S.W.2d 594 (Tex.Cr.App.1981); *People v. Penn*, 70 Mich. App. 638, 247 N.W.2d 575 (1976).

[8] However, we are of the opinion, from a careful reading of the entire transcript and original record, that there is a sufficient record before us to resolve the appellant's allegation that he was prejudiced by the existence of a contract between himself and trial counsel, J. Malone Brewer, because Brewer failed to uphold his end of the bargain, to wit: the investigation and presentation of a defense at trial. We have reviewed each of the alleged flaws in counsel's performance in light of the alleged conflict of interest. The trial transcript amply demonstrates that Stafford was neither prejudiced nor otherwise adversely affected by the possible existence or breach of any contract with his trial counsel. See *United States v. Hearst*, 638 F.2d 1190 (9th Cir.1980), cert. den. 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325. Even if there was proof of the existence of a contract, it would merit his cause nothing. An ethical violation, standing alone, does not constitute ineffective assistance of counsel.

[9] Appellant urges that trial counsel failed to investigate appellant's psychiatric background since he did not offer such evidence in mitigation during the sentencing hearing. This argument supposes the existence of favorable psychiatric testimony. The record does not support the supposition.

Appellant was delivered to Eastern State Hospital in Vinita, Oklahoma, on March 27, 1979, for various treatments, including "complete psychological profile" and "complete psychiatric examination and evaluation." He was to be held up to sixty days, but was discharged a short time later on April 18, 1979. Prior to trial, trial counsel moved for the production of the psychological evaluation expressing the belief that it would be exculpatory. Although the disposition of this request is not clear, a communication from the prosecutor's office to defense counsel dated October 4, 1979, indicates that all requested reports were delivered to trial counsel.

Appellant has the burden of proving his ineffectiveness of counsel argument. *Phillips v. State*, supra. The crucial psychologi-

cal evaluation is not in the record on appeal, and we may not assume that it was favorable to the defense. Appellant's suggestion that he was operated on for a brain tumor at the age of twelve, and that he has been in and out of mental institutions, is wholly unsupported by the record.

[10] Appellant next urges that trial counsel failed to interview him before trial. This is based on an isolated portion of appellant's testimony at trial.[1] Viewed with other relevant testimony, it appears that counsel did in fact confer with appellant and that appellant merely meant to convey that counsel had not coached his testimony or told him what to say.[2]

[11] Appellant further urges that counsel failed to offer any evidence during the second stage sentencing hearing, and that the jury therefore had no basis for deciding punishment. However, both the State and the defense opted to rely on the evidence submitted in the first stage guilt proceeding, neither side offering additional evidence in the second stage. [Tr. 1176 and 1177.] The jury was instructed that it could consider in the sentencing stage any evidence admitted throughout the trial by either side. Appellant does not indicate what additional evidence could or should have been offered in the sentencing hearing. See *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182 (1981).

Appellant next argues that trial counsel called a former cellmate to the witness stand without first obtaining a sworn statement from the witness. On the morning of the fifth day of trial, the State produced a second former cellmate who testified concerning incriminating statements made by appellant. In order to blunt the effect of this testimony, the witness in question was called to the stand that afternoon. Appellant later testified that the witness had written him offering to testify for the defense and that he gave the witness' name to trial counsel. As late as 12:30 P.M. the day in question, the witness is alleged to have told counsel that he would testify favorably to the defense. However, the witness actually gave testimony damaging to appellant.

[12, 13] In hindsight, appellant's suggestion on appeal appears flawless. However, hindsight is not the proper measure of the adequacy of legal representation. See *Walker v. State*, 550 P.2d 1339 (Okl.Cr. 1976). Allowing counsel a necessary measure of discretion in judging the urgency for rebutting the prosecution's witness and given the witness' apparent recent affirmation of the tenor of his intended testimony,

1. The prosecutor cross-examined appellant at Tr. 986:

Q. All right. Now, you said something yesterday that I may have misunderstood.

Did you tell us that you had never talked to Mr. Brewer about your testimony in this case?

A. That's right.

Q. Never at any time in preparation for this rather serious case, did you ever talk to him about what your testimony would be?

A. No, sir.

Q. Did you ever talk to anybody about it? Any of the defense lawyers?

A. No, sir.

Q. So they didn't know until you went on the stand right now or yesterday what you were going to say about where you were and what you had done?

A. Right.

2. Defense counsel elicited the following from appellant on direct and re-direct examination at Tr. 939-940 and 1000:

Q. At any point in time through this trial, have I told you what to say?

A. No.

Q. At any time during this trial, have we rehearsed what you're going to say?

A. Absolutely not.

Q. As a matter of fact, at any period of time, did we dwell upon your testimony at great lengths?

A. No, not at all.

Q. You're testifying solely from your memory, best you know?

A. The best as I can.

* * * * * *

BY MR. BREWER:

Q. All right. Now, Roger, when it was brought up that had you discussed your testimony as you testified before with defense counsel, what are you saying?

That you and I've never even talked about this case? Or I did not plan it for you?

A. I did not plan for you.

Q. We have discussed it though, have we not?

A. Oh, yeah, to a degree, yeah.

counsel's action was, at most an error of judgment within the meaning of *Phillips v. State*, supra.

Appellant finally argues that counsel erred in failing to timely designate the voir dire proceedings for inclusion in the record on appeal. The original designation of record expressly excluded the voir dire proceedings. A later amended designation included voir dire, but there is no indication that it was ever served upon the court reporter. It now appears that the reporter's notes of voir dire are unavailable.

[14] Whether or not voir dire and similar proceedings should be recorded is a matter of trial tactics, and a decision not to have such proceedings recorded is not ineffective assistance absent supplementation of the record by affidavit or pleading, showing alleged prejudicial occurrences. See *Webb v. State*, 612 P.2d 285 (Okl.Cr. 1980), applying *Baker v. State*, 593 P.2d 100 (Okl.Cr.1978). See also *Johnson v. State*, supra. We find that the same rule should govern counsel's decision whether to designate for transcription voir dire and other proceedings.

[15] In the case at bar, there is no basis for finding that counsel should have designated the voir dire proceedings. We note appellant's suggestion that jurors might have been excluded for cause at voir dire in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). This suggestion is refuted by defense argument at trial that the judge improperly applied the majority opinion in *Witherspoon* at voir dire, rather than the specially concurring opinion in that case. [Tr. 10–14; O.R. 234–236.] It was alleged at trial that eight jurors were excused for cause under the majority opinion in *Witherspoon*, and the trial judge in Stafford's trial remarked that he "was amazed at the very low, small number who went off for that reason." [Tr. 14.]

[16] In conclusion, trial counsel filed numerous pre-trial motions on appellant's behalf, interposed frequent objections during the prosecution's case, and vigorously cross-examined the State's witnesses. He placed appellant on the stand in an effort to establish an alibi defense. Though not offering evidence in the sentencing hearing, counsel argued mitigating circumstances to the jury and made an impassioned plea for appellant's life. The case against appellant was very formidable. We are unable to find on the record before this Court that appellant has sustained his burden of proving ineffective assistance of counsel.

IV

[17, 18] Stafford argues that the trial court erred in allowing the introduction of several color photographs in evidence. The six photographs in question depict five of the Sirloin Stockade employees shot to death in the freezer. The admissibility of photographs lies within the sound discretion of the trial judge. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980). At bar, the trial judge found that the probative value of the photographs outweighed their prejudicial effect. We do not find fault with this ruling. The photographs were probative to illustrate the medical examiner's testimony. They also enabled the jury to view the manner in which the victims were killed and, thereby, corroborated the testimony of Verna Stafford. See *Chaney v. State*, 612 P.2d 269, 275 (Okl.Cr.1980).

V

[19] Stafford advances that the trial court erred by allowing Verna Stafford to testify. He contends that Verna Stafford's testimony violated the husband and wife privilege under 12 O.S.1981, § 2504. Section 2504 provides in part:

> A. A communication is confidential for purposes of this section if it is made privately by any person to his spouse and is not intended for disclosure to any other person.
>
> B. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

Verna Stafford testified in regard to the facts and circumstances surrounding the Sirloin Stockade murders. She stated that her husband, Roger Stafford, planned the robbery and subsequently caused the death of several of the employees. Our initial inquiry is whether Verna Stafford's testimony breached any confidential communications between her and Roger Stafford.

In *Lavicky v. State*, 632 P.2d 1234, 1236 (Okl.Cr.1981), we stated that "[c]onfidential communications between husband and wife are those made when they're alone, or are those expressly made confidential, or are of a confidential nature induced by the marital relationship, the disclosure of which are calculated to disturb the marital relationship." In this case, the trial judge specifically limited Verna Stafford's testimony to her personal observations and conversations with her husband which were made in the presence of third persons. Clearly, the conversations between Verna and Roger Stafford in the presence of a third party were not of a confidential nature as is required under 12 O.S.1981, § 2504(A).

The evidence at trial sufficiently established that Harold Stafford was present during most of the conversations between Verna and Roger Stafford. The trial judge specifically excluded all statements made privately between Verna and Roger Stafford, therefore, we conclude that Verna's testimony did not violate the husband-wife privilege, as protected under Section 2504(B).

In a related argument, Stafford contends that the trial court erred in admitting the testimony of Linda Lewis. Ms. Lewis overheard a conversation between Roger and Verna Stafford. Stafford argues that the conversation was intended to be confidential and therefore protected under Section 2504, the husband-wife privilege.

Ms. Lewis testified that she overheard a conversation between Roger and Verna in the parking lot outside her Tulsa motel window after the homicides. She related to the jury the following events:

Ms. Lewis: I was in my room, sir. I heard the commotion. I went to my window. I looked out, and I seen who it was. And, you know, I seen him hit her, and I opened my door—

Q. All right, excuse me. Just tell us, please, what you heard and saw? In the first place, are you—who was it that you saw?

A. I saw Roger and Verna.

Q. All right. Tell us what you first saw, please?

A. I saw Roger slap Verna, and she said, "I'm calling the police." And Roger said, "Go ahead. You would be in as much trouble as I would".

And she said, "I didn't kill them Roger. You did." Roger said, "You were there, and you were with us".

And I heard something else, and then Verna said, "No".

[20, 21] The appellant, citing *Seigler v. State*, 54 Okl.Cr. 141, 15 P.2d 1048 (1932), argues that where a conversation between husband and wife is intended to be confidential and the parties are unaware of an eavesdropper, the conversation maintains its cloak of privilege. A plain reading of *Seigler* makes obvious the inaccuracy of the appellant's statement. In *Seigler*, this Court stated that "[t]he rule is that third parties may testify to communications had between husband and wife, overheard by such third persons." 54 Okl.Cr. at 143, 15 P.2d at 1048. We hold that irrespective of whether communications between husband and wife are intended to be confidential, third persons may testify as to conversations overheard, whether accidentally or by design. See *Hilderbrandt v. State*, 22 Okl.Cr. 58, 209 P. 785 (1922). Accordingly, we find that Ms. Lewis' testimony was properly admitted into evidence.

VI

[22] Appellant contends that the trial court erred in denying an application for change of venue. Resolution of this issue depends upon whether appellant established that the inhabitants of the county had such fixed opinions as to his guilt that he could not receive a fair trial by an impartial jury.

Mooney v. State, 273 P.2d 768 (Okl.Cr.1954). See also *Thomsen v. State*, 582 P.2d 829 (Okl.Cr.1978).

[23] According to the transcript of the hearing on the application, appellant introduced nine affidavits, some newspaper clippings and the testimony of three Oklahoma City area television newspersons in support of change of venue. The affiants, all residents of Oklahoma and Canadian counties, stated that they had formed opinions as to appellant's guilt or innocence and expressed the belief that he could not obtain a fair and impartial jury in light of the atmosphere prevailing in central Oklahoma. In this regard, appellant's trial counsel advised the court that only nine of one hundred fifty-one persons interviewed agreed to sign affidavits, the remainder expressing one of three viewpoints: they did not want to become involved; they believed that appellant should be tried and "hung" in Oklahoma County; or, they had no opinion in the matter.

The newspersons testified that the case had received extensive coverage, but that references to appellant were always prefaced by such qualifying language as "accused", "alleged" and "suspected." The newspaper clippings concededly did not represent a "complete and concise" coverage of the reports published in the county.

The transcript further reveals that the State offered fifty affidavits in opposition to change of venue. The affiants, all residents of Oklahoma County, stated that the media coverage of the case had been fair, that an unbiased jury could be selected in Oklahoma County, and that they had formed no opinions as to appellant's guilt or innocence.

Except for five of the defense affidavits, the newspaper clippings and the prosecution and defense affidavits are not in the record on appeal. On the record before us, we find no abuse of discretion in the denial of the application.

[24] Appellant also contends that the trial court erred in denying a motion for individual voir dire of the prospective jurors. However, since the transcript of voir dire is not in the record on appeal, we must assume that the judge's rulings were correct. *Henderson v. State*, 385 P.2d 930 (Okl.Cr.1963). For all that appears, the motion was never called to the attention of the court, see generally *Smith v. State*, 644 P.2d 106 (Okl.Cr.1982); or the circumstances brought out at voir dire warranted denial of the motion in the trial court's discretion, *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); or, individual voir dire was in fact conducted. This argument is not properly before this Court.

VII

[25] It is further advanced that the State failed to produce all exculpatory evidence. Specifically Stafford claims that the State deliberately withheld a written statement given by Verna Stafford on March 8, 1979. In the initial pages of the 166 page statement, Verna denied any involvement in the Sirloin Stockade murders. However, as this interview wore on, Verna admitted her involvement in the Stockade murders and implicated Roger. The appellant argues that the rule set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), mandates a reversal of his conviction. We disagree.

In *Brady*, the Supreme Court ruled that the prosecution's suppression of exculpatory evidence where there is a specific request, "violates due process where the evidence is material either to guilt or punishment. . . ." 373 U.S. at 87, 83 S.Ct. at 1196–97. See also *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) and *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982).

In this case, the record is unclear as to whether defense counsel received a copy of Verna Stafford's statement taken on March 8, 1979. Irrespective of whether the defense was provided a copy of the statement, we find that the appellant's due process rights were not violated. During the direct examination of Verna Stafford the prosecution brought out the fact that in her first statement to the police she denied involvement in the Stockade murders. The prose-

cution questioned Verna Stafford as follows:

Q In regard to that first questioning, Mrs. Stafford, what did you tell the officers?

A I told them that I did not have the gun, and that I didn't know—and I didn't help to plan the robbery, and I just came down here.

Q Excuse me, Mrs. Stafford, I'm talking about the very first time that you were questioned now. What did you tell them about whether you had been to Oklahoma City or not?

A The very first statement, I told them that I hadn't ever been here.

Q What did you tell them about Roger and Harold or their being involved in it?

A I told them that none of us had come down here.

Q All right. Did you subsequently change that during the time of that statement?

A Yes, sir.

MR. BREWER: If the Court please, we're going to renew our objections as to hearsay at this point.

Therefore, we find that even if the prosecution did fail to provide the defense with the March 8th statement, it did not affect the outcome of the trial since the prosecution presented this evidence to the jury for their consideration.

VIII

[26] Stafford advances that because he was not taken before a magistrate until two days after his arrest, his statements given in the interim should have been suppressed. The record reveals that while Stafford was in custody he was informed that he was being held on a murder complaint; he was read his *Miranda* rights; he was questioned in regard to the Stockade slayings; and, he gave a statement prior to being taken before a magistrate for the initial arraignment.

In *Stidham v. State*, 507 P.2d 1312 (Okl.Cr.1973), this Court, in addressing an identical argument, stated that the burden is on the accused to establish prejudice by reason of the delay in taking him before a magistrate, in addition to the delay itself. In the case presently before this Court, we find that the appellant has wholly failed to show any prejudice resulting from the two day delay. We find the appellant's argument to be without foundation.

IX

The appellant further argues that the testimony of Verna Stafford regarding statements made by Harold Stafford and the manager of the Sirloin Stockade were inadmissible hearsay. He contends that the introduction of these hearsay statements violated his Sixth Amendment right to confront witnesses because he was denied an opportunity to cross examine the persons who allegedly made the statements.

[27] At trial, Verna Stafford testified that "Harold said he would go ahead and get the guns ready ...." We find that under 12 O.S.1981, § 2801(4)(b)(5) this testimony does not constitute hearsay. Section 2801(4)(b)(5) provides that a statement is not hearsay if made "by a coconspirator of a party during the course and in furtherance of the conspiracy." At bar, there was ample evidence that Roger Stafford and Harold Stafford had entered into a conspiracy to rob the Sirloin Stockade. Under Section 2801(4)(b)(5) Harold Stafford's statements made in the course of the conspiracy and in furtherance of the conspiracy were admissible against his coconspirator, Roger Stafford.

[28] The appellant also objects on hearsay grounds that it was improper for Verna Stafford to testify about statements allegedly made by the deceased manager of the Sirloin Stockade. When asked what the manager told Roger Stafford, Verna stated, "he said that he couldn't understand why people had to take other people's money, why they couldn't work for themselves." The resolution as to whether this statement constitutes hearsay requires an understanding of the statutory definition of hearsay.

Title 12 O.S.1981, § 2801(3) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted..." The crucial determination in this case, is whether the statement objected to was offered to prove the truth of the matter asserted. Here, we find that the out-of-court statement was not offered for its truth. This statement is relevant solely because it was made, it does not matter whether the assertion is true. The reliability of the statement is not dependent upon the veracity of a declarant unavailable for cross-examination. Therefore, we find that the statement in question does not fall within the definition of hearsay. *Goodwin v. State*, 625 P.2d 1262, 1265 (Okl.Cr.1981).

X

[29] We find that the death sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor. 21 O.S.1981 § 701.13(C)(1). Although the victims were employed and presumably resided in the Oklahoma County area and high public feeling could be expected, the transcript does not reflect any bias or prejudice. *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980). Moreover, the evidence against appellant was overwhelming, and in itself provided ample support for the verdict. *Ake v. State*, 663 P.2d 1, 54 O.B.A.J. 996 (Okl.Cr.1983).

[30] We further find that the evidence supports the jury's findings of four statutory aggravating circumstances. 21 O.S.1981, § 701.13(C)(2). First, the evidence was sufficient to show that appellant knowingly created a great risk of death to more than one person. 21 O.S.1981, § 701.12(2). Appellant crowded the six victims into a meat freezer the size of a closet and, with the aid of Harold Stafford, opened fire at close range. One of the victims died of a bullet wound to the neck, the remainder suffering fatal head wounds.

[31] Second, the evidence was sufficient to support a finding that the murders were especially heinous, atrocious, or cruel. 21 O.S.1981, § 701.12(4). "Heinous" is defined as "extremely wicked or shockingly evil"; "atrocious" means "outrageously wicked and vile"; and "cruel" imports a design "to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *Boutwell v. State*, 659 P.2d 322, 329 (Okl.Cr.1983), quoting with approval *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

The victims, ranging in age from 16 to 56, anxiously inquired concerning their safety several times during the course of the robbery. They were repeatedly assured that they would not be harmed, even as they were forced into the freezer and ordered to sit on the floor. The horrible truth must have become apparent the instant appellant pointed his gun and shot, in turn, Isaac Freeman and the manager, Louis Zacarias. According to Verna Stafford, there was "a lot of screaming." Several of the victims were shot from three to five times. Appellant later said that it was "like shooting a balloon in a bag of water", and "like shooting a fence post."

The evidence amply supports this aggravating circumstance. *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982), is distinguishable due to the absence in that case of "evidence of any physical or mental suffering whatsoever." 651 P.2d at 707.

[32] Third, the evidence supports the finding that the murders were committed for the purpose of avoiding or preventing lawful arrest or prosecution. 21 O.S.1981, § 701.12(5). As the restaurant manager entered the freezer, he said that the robbers would do no more than walk down the road before being caught, and that he, the manager, would see to it that their "knees would be run into the ground" so as to spare himself any similar ordeal in the future. Thereafter, contrary to plan, appellant pressured Harold Stafford into helping shoot the witnesses.

[33, 34] Finally, the evidence clearly suggests that there exists a probability that appellant would commit criminal acts of violence that would constitute a continuing

threat to society. 21 O.S.1981, § 701.12(7). There was testimony that, prior to his arrest, appellant threatened the life of a witness, Rose Anna Marie Collins, to ensure her silence. On the other hand, we observe that there was no evidence at trial of prior criminal acts of violence by appellant. However, "the circumstances of the offense may furnish extremely probative evidence of the probability of future acts of violence." *Russell v. State*, 598 S.W.2d 238, 254 (Tex.Cr.App.1980), cert. den. 449 U.S. 1003, 101 S.Ct. 544, 66 L.Ed.2d 300, construing Texas Code Criminal Procedure, Article 37.071, which is similar to § 701.12(7).

In this case, appellant and his confederates carefully planned the armed robbery. The savage, execution-style killing of the restaurant employees, coupled with appellant's shockingly calloused attitude and his later threat against witness, Collins, supports the jury finding.

[35] Finally, we find that the death sentences were not excessive or disproportionate compared with the penalty imposed in similar cases and considering both the crime and the defendant. 21 O.S.1981, § 701.13(C)(3). We have compared this case with several prior decisions, including those in which the death sentence was affirmed,[3] and those reversed or modified to life imprisonment.[4] We have especially considered those cases involving murder in the course of robbery. See *Johnson v. State*, supra, Note 5; *Ake v. State*, supra, Note 4; *Hatch v. State*, supra, Note 5; *Smith v. State*, supra, Note 4; *Boutwell v. State*, supra, Note 5; *Irvin v. State*, supra, Note 5; and *Hays v. State*, supra, Note 4.

3. *Ake v. State*, 663 P.2d 1, 54 O.B.A.J. 996 (Okl.Cr.1983); *Smith v. State*, 659 P.2d 330 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980); and *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980), remanded for resentencing. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

4. *Hatch v. State*, 662 P.2d 1377, 54 O.B.A.J. 1003 (Okl.Cr.1983); *Jones v. State*, 660 P.2d 634, 54 O.B.A.J. 661 (Okl.Cr.1983); *Johnson v. State*, 662 P.2d 687, 53 O.B.A.J. 730, rehearing granted and opinion amended, 54 O.B.A.J. 398 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343 (Okl.Cr.1983); *Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482, 54 O.B.A.J. 109 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982); *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980).

Finding no error warranting reversal or modification, the judgments and sentences are AFFIRMED.

BUSSEY, P.J., and BRETT, J., concur.

Rolando Barboza SANCHEZ, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-82-599.

Court of Criminal Appeals of Oklahoma.

June 27, 1983.

Defendant was convicted before the District Court, Tulsa County, Richard F. Armstrong, J., of burglary in the first degree, and he appealed. The Court of Criminal Appeals, Bussey, P.J., held that a "breaking" occurred where apartment dweller, in response to ringing of doorbell, opened door only a few inches and defendant pushed it open as occupant was attempting to close it.

Affirmed.

1. Burglary ⇐9(1)

A "breaking," for purpose of burglary conviction, occurred where in response to doorbell apartment dweller opened the door only a few inches and as she was attempt-

APPENDIX P

Order of the Oklahoma Court of
Criminal Appeals Denying Petition for Rehearing

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROGER DALE STAFFORD,]
]
Appellant,]
]
-vs-] No. F-79-722
]
THE STATE OF OKLAHOMA,]
]
Appellee.]

ORDER DENYING PETITION FOR REHEARING
DIRECTING ISSUANCE OF MANDATE
AND SETTING EXECUTION DATE

A petition for rehearing has been filed in the above styled and numbered cause. The State has filed a response to the petition. Being fully advised in the premises, the petition for rehearing is DENIED. The Clerk is directed to issue the mandate forthwith.

The stay in execution previously entered by this Court is vacated. The date for execution of the sentences is hereby set for the 1st day of December, 1983.

SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of July, 1983.

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

Clerk

CRF-79-726

APPENDIX C

Order Extending Time in which to file
Petition for Writ of Certiorari

Supreme Court of the United States

No. A- 209

ROGER DALE STAFFORD,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 23, 19 83

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 23rd

day of September, 19 83.

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROGER DALE STAFFORD, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

83-5636

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ROGER DALE STAFFORD, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner filed herewith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

Robert A Ravitz

ROBERT A. RAVITZ
409 County Office Building
320 Robert S. Kerr
Oklahoma City, Oklahoma 73102
(405) 236-2727, ext. 582

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD,)
)
Petitioner,)
)
v.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, ROGER DALE STAFFORD, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since 11-2-79.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains $Nothing.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Roger D Stafford Sr.
ROGER DALE STAFFORD SR.

STATE OF OKLAHOMA)
) SS:
COUNTY OF PITTSBURG)

Subscribed and sworn to before me on this 19 day of Oct, 1983.

James R Eastham
Notary Public

My Commission Expires:

6-25-85